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In the Supreme Court of the United States

OCTOBER TERM, 1976

ERIE LACKAWANNA RAILWAY COMPANY, PETITIONER

v.

L. F. COLE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This submission is made in response to the Court's invitation to the Solicitor General to express the views of the United States in this case.

QUESTION PRESENTED

The United States will discuss the following question:

Whether the decision of a special adjustment board, convened under Section 3 Second of the Railway Labor Act, is invalid unless the labor organization authorized to represent the employee whose grievance was submitted for arbitration gave the employee a full opportunity to assist in the preparation of his case.

STATEMENT

1. Section 3 of the Railway Labor Act, 44 Stat. 578, as amended, 45 U.S.C. 153, establishes a scheme of compulsory arbitration of disputes arising under collective bargaining agreements between labor organizations and rail carriers.

Section 3 First establishes the National Railroad Adjustment Board as a standing adjudicatory body whose members are selected in equal numbers from, and paid by, the labor unions and rail carriers.[1] Matters may be brought before the Adjustment Board by either the carrier or the employee or his representative. Section 3 First (i). See generally *Elgin, J. & E. Ry. Co.* v. *Burley* (*Burley I*), 325 U.S. 711, adhered to on rehearing, *Elgin, J. & E. Ry. Co.* v. *Burley* (*Burley II*), 327 U.S. 661. "Parties may be heard either in person, by counsel, or by other representatives, * * * and * * * the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes * * * ." Section 3 First (j).

Section 3 Second of the Act provides for arbitration before special boards of adjustment, known in practice as "public law boards," that operate independently of the Adjustment Board:

> If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, * * *

[1] If the Adjustment Board becomes deadlocked in a particular case, the National Mediation Board selects a neutral person to decide the case. Section 3 First (*l*).

> or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. * * * Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. * * * If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes.

Unlike Section 3 First, Section 3 Second by its terms does not require notice to, or permit participation by, individual employees.

2. Respondent Cole was discharged from employment with petitioner Erie Lackawanna Railway Company in 1971 (Pet. App. A2, A31). Respondent, contending that his discharge was improper under the collective bargaining agreement between petitioner and the United Transportation Union, of which he was a member, took his grievance to the Union (Pet. App. A14, A31). Petitioner and the Union agreed to submit respondent's grievance to a special adjustment board, Public Law Board No. 855, which they had established under Section 3 Second of the Railway Labor Act (*ibid.*). Respondent was informed by the Union that a hearing was to be held in his case before the special adjustment board (Pet. App. A15-A16). The Union represented respondent at the hearing (Pet. App. A31). The board subsequently sustained respondent's discharge.

Respondent sought review of the board's decision in the United States District Court for the Northern District of Ohio. The district court held that the requirement in Section 3 First (j) that the Adjustment Board give "due notice of all hearings to the employee" also applied to special adjustment boards established under Section 3 Second, and it concluded that the board had failed to give respondent "due notice" (Pet. App. A29-A36). The court therefore set aside the board's decision and remanded the case to the board for reconsideration (Pet. App. A36-A37).[2]

On remand, another hearing was held before the special adjustment board, at which respondent was represented by counsel (Pet. App. A22). Following the hearing, the board reduced respondent's discharge to a 365-day disciplinary lay-off, reinstated respondent in his position with full seniority and other rights, and granted respondent back pay for the period from the expiration of the lay-off to his reinstatement (*ibid.*).

Petitioner refused to comply with the award, arguing that the board's first decision had been correct and that the district court's remand had been improper. Respondent returned to the district court, seeking enforcement of the award. The court reviewed new evidence submitted by petitioner on the question whether respondent had received adequate notice of the board's first hearing and reaffirmed its prior decision that notice had not been adequate (Pet.

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[2]Because the district court neither enforced, nor denied enforcement of, the board's order, but remanded the matter to the board for further proceedings (Pet. App. A36-A37), its order was not appealable under 28 U.S.C. 1291. *United Transportation Union* v. *Illinois Central R. Co.*, 433 F. 2d 566 (C.A. 7), certiorari denied, 402 U.S. 915; *Transportation-Communication Division, Brotherhood of Railway, Airline and Steamship Clerks* v. *St. Louis-S.F. Ry. Co.*, 419 F. 2d 933 (C.A. 8), certiorari denied, 400 U.S. 818. See Section 3 First (q).

App. A21-A28). Accordingly, the court ordered petitioner to comply with the board's decision on remand (Pet. App. A29).

On appeal, petitioner argued, *inter alia*, that the notice requirement of Section 3 First (j) does not apply to special adjustment board proceedings held pursuant to Section 3 Second and that, in any event, the notice to respondent had been sufficient (Pet. App. A7). The court of appeals, in a 2-1 decision, rejected these arguments. With respect to the requirement of notice, the majority stated (Pet. App. A11):

> It is clear that special adjustment boards have jurisdiction coextensive with that of the [National Railroad Adjustment Board]. [Petitioner] has advanced no good reason why the statutory procedural rights afforded to employees whose claims are heard by special adjustment boards should be less than those enjoyed by employees whose claims are resolved by the NRAB. We therefore conclude that Section [3] First (j) applies to proceedings before special adjustment boards.

With respect to the sufficiency of notice, the majority acknowledged that since respondent had authorized the Union to represent him, only actual notice from the Union, not formal notice from the board, was required (Pet. App. A13-A15). But the majority defined "actual notice" as "notice of the hearing for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim" (Pet. App. A14). Although respondent had received advance notice of the hearing, the majority concluded that the notice was not sufficient, reasoning that, since the Union told respondent "that he could not attend the hearing on his claim and that his witnesses

would not be needed" (Pet. App. A16), it could be inferred that respondent "was not allowed to convey information which might have been helpful in presenting his claim" (*ibid.*).

Judge Engel, dissenting, agreed that the notice requirement of Section 3 First (j) applied to special adjustment board proceedings but disagreed with the majority's holding with respect to the sufficiency of notice in this case. Judge Engel stated that, under this Court's decisions in *Burley I* and *Burley II*, *supra*, once an employee has authorized his union to represent him, it is sufficient if the employee has actual knowledge of the proceedings (Pet. App. A17-A19). Judge Engel concluded (Pet. App. A20):

> * * * I am unable to see upon the facts in this case how more formal or direct notice to [respondent] would have affected his course of action. [Respondent] clearly authorized the union to represent him. He conferred with the union and acted on its advice and counsel. The difficulty is not in the notice; it is in the advice which the union gave [respondent] after the notice.

DISCUSSION

We agree with petitioner (see Pet. 2) that the question in this case cannot accurately be stated as whether the special adjustment board complied with a statutory requirement, if any, that it provide notice of all hearings to respondent. Although the opinion of the majority below is couched in terms of "notice," its decision does not appear to turn upon the requirement, or adequacy, of notice in any true sense. Instead, the majority appears to have held that the decision of a special adjustment board is invalid unless the labor organization authorized to represent the employee gave him

a full opportunity to assist in the preparation of his case. That holding is incorrect. An employee's representative may or may not owe a duty to the employee to provide him an opportunity to assist in the preparation of his case. But breach of that putative duty would at most give rise only to a cause of action against the representative; it does not affect the validity of the special adjustment board's arbitral decision.

1. The decision below cannot be rationalized in terms of a statutory requirement of notice.

a. In our view, the requirement of Section 3 First (j) that "the Adjustment Board shall give due notice of all hearings to the employee" does not apply to special adjustment boards convened under Section 3 Second.

The requirement that the Adjustment Board give notice to the employee effectuates the employee's right, if he so chooses, to bring a matter before the Adjustment Board in person or by private counsel. See *Burley I*, *supra*, 325 U.S. at 734-735. But by the terms of the statute, an individual employee has no right to bring a matter before a special adjustment board convened under Section 3 Second. Only the rail carrier or "the representative of any craft or class of employees" (Section 3 Second), *i.e.*, a labor organization (see S. Rep. No. 1201, 89th Cong., 2d Sess. (1966)), is authorized by the statute to bring a matter before a special adjustment board. See *Brotherhood of Locomotive Engineers* v. *Denver & R.G. W. R. Co.*, 411 F. 2d 1115 (C.A. 10). Moreover, a carrier cannot submit to a special adjustment board a dispute involving an employee who chooses not to be represented by his labor organization. *Chicago, R.I. & P. R. Co.* v. *National Mediation Board*, 435 F. 2d 339 (C.A. 7). And Section 3 Second does not authorize the individual employee to participate in the proceedings without representation once the special adjustment board is convened.

Accordingly, Congress did not require special adjustment boards to give notice of hearings to the individual employee; in all cases, notice to the representative would suffice. For that reason, Section 3 Second, which authorizes the establishment of special adjustment boards, imposes no notice requirement upon such boards. And the notice requirement of Section 3 First (j) by its terms applies only to the National Railway Adjustment Board, not to special adjustment boards.

b. But even if the notice requirement of Section 3 First (j) is construed to apply to special adjustment boards, it requires nothing more of such boards than is required of the Adjustment Board in cases in which the employee is represented by his labor organization. The employee's right under Section 3 First (j) to receive notice of hearings before the Adjustment Board is a "statutory right[], which he may exercise independently or authorize the union to exercise in his behalf." *Burley I, supra,* 325 U.S. at 740 n. 39. See *Czosek* v. *O'Mara,* 397 U.S. 25, 28 n. 1. It follows that when the employee designates a labor organization to act as his exclusive representative in a matter before the Adjustment Board, he has authorized the labor organization to receive on his behalf notice of all hearings. Cf. Rule 5(b), Fed. R. Civ. P. The Adjustment Board therefore discharges its duty to provide notice in such cases by giving notice to the representative.[3] Since in cases before special adjustment

[3]This Court has indicated that "due notice," within the meaning of Section 3 First (j), "would require at the least * * * knowledge on the aggrieved employee's part of the pendency of the proceedings or knowledge of such facts as would be sufficient to put him on notice of their pendency." *Burley II, supra,* 327 U.S. at 666 n. 9. But we understand that to mean that even when the employee represents himself, formal notice is not required in view "of the generally informal procedure of the [Adjustment] Board." *Ibid.* We do not read the statute to require the Adjustment Board either to provide actual notice to a represented employee or to ensure that his representative provides him with such notice. However, if the Court's statement endorses a requirement of actual notice even to represented employees, then we agree with the Seventh Circuit that that requirement is satisfied where "the record discloses that [the employee] knew his grievance had been submitted to the Adjustment Board and that he had authorized the union to represent him there." *Kotakis* v. *Elgin, J. & E. Ry. Co.,* 520 F. 2d 570, 576. See also *Hunter* v. *Atchison, T. & S.F. Ry. Co.,* 188 F. 2d 294, 301 (C.A. 7).

boards the labor organization always acts as the employee's exclusive representative (see pp. 2-3, *supra*), such a board satisfies any statutory notice requirement by notifying the labor organization.

c. Respondent "authorized the [Union] to handle his grievance * * * before the special adjustment board" (Pet. App. A14). In particular, he granted the Union "authority to receive notice of hearings" (*id.* at n. 14).[4] The special adjustment board duly notified the Union that a hearing would be held (Pet. App. A31). Moreover, respondent not only "knew his grievance had been submitted" (see note 3, *supra*), he also "knew there was going to be a hearing" (Pet. App. A16). In these circumstances, any notice requirement imposed on the special adjustment board by the Act was amply satisfied.

2. The implicit basis for the decision below appears to be a belief that the underlying purpose of a statutory notice requirement—to facilitate adequate preparation for and representation at the hearing—had gone at least partially unfulfilled in this case, notwithstanding that the Union and respondent had received notice. In ruling that the initial decision of the special adjustment board was invalid, the court of appeals reasoned that since the Union had informed

[4]Respondent could have withdrawn this authorization by serving "reasonable written notice" (*ibid.*) on the Union, but he did not do so.

respondent "that he could not attend the hearing on his claim and that his witnesses would not be needed" (Pet. App. A16), respondent thereby "was not allowed [by the Union] to convey information which might have been helpful in presenting his claim" (*ibid.*). In practical effect, the court sustained the reversal of the special adjustment board's initial decision on the ground that, in the majority's judgment, the Union had not adequately represented respondent in connection with the hearing.

This is an impermissible basis for decision under the Railway Labor Act. If an employee is dissatisfied with the way his claim was presented to a special adjustment board and believes that his representation was faulty or inadequate, he may attempt to recover damages from the representative. Cf. *Czosek* v. *O'Mara, supra.* But the statute does not allow a reviewing court to reverse a decision of a special adjustment board on the ground that the employee had been poorly represented. Reversal of a special adjustment board's decision is permitted only "for failure of the [board] to comply with the requirements of [the Act], for failure of the order to conform, or confine itself, to matters within the scope of the [board's] jurisdiction, or for fraud or corruption by a member of the [board]." Section 3 First (p), (q) of the Act.[5]

By couching its decision in terms of "notice," the court of appeals rested upon an alleged "failure of the [board] to comply with the requirements of [the Act]." But nothing in the Act requires the special adjustment board to ensure that the employee's representative will give him a full

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[5]We agree with the holding below that decisions of special adjustment boards are subject to judicial review under Section 3 First (p) and (q). See Pet. App. A7-A9.

opportunity to assist in the preparation of his case. There was no failure on the part of the special adjustment board to comply with the Act.

Under the decision below, however, an *ex post facto* allegation of inadequate representation may be cast, at least in many foreseeable situations, as a challenge to the adequacy of notice. This result is unfortunate. Neither the special adjustment board nor the opposing rail carrier can be expected, or would be able, to police the adequacy of the employee's representation. Certainly the carrier cannot fairly be asked to challenge the adequacy of the employee's representation before the board. Moreover, in a case such as this, where the perceived inadequacy appears to be that the representative discouraged the employee from developing or presenting favorable evidence, there would be little or no reason for either the board or the carrier to suspect the inadequacy of representation. Knowledge of the matter would lie exclusively with the employee and his representative.

In these circumstances, it could be anticipated that a challenge to the adequacy of representation, if permitted to be made in the guise of challenge to the adequacy of notice, would be raised by the employee only after the special adjustment board had entered a decision adverse to him. For the courts to entertain such challenges would weaken the arbitral process under the Act by undermining the finality of awards: each award would be subject to attack on the basis of facts known only to the employee and his representative, such as, in this case, the substance of the employee's discussions with his union. In other words, to permit a decision of a special adjustment board to be overturned in fact on the basis of *ex post facto* allegations relating to the adequacy of representation would be improperly to permit "an employee [to] stand by with knowledge or notice of what is going on with reference to his

claim, * * * allow matters to be thrashed out to a conclusion * * *, and then come in for the first time to assert his individual rights." *Burley II, supra*, 327 U.S. at 666-667.[6]

3. The decision below warrants review by this Court. For the reasons just described, the holding of the majority threatens the integrity of the arbitral process under the Railway Labor Act. It calls into question a large number of past decisions by special adjustment boards.[7] In view of the fact that the liberal venue provisions of the Act would allow a disproportionate number of suits for review to be brought in the Sixth Circuit,[8] this Court should not await the development of a conflict before resolving the question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

JUNE 1977.

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[6]If the employee believes that his representation before a special adjustment board convened under Section 3 Second is inadequate, his proper recourse is to withdraw his authorization while the matter is still pending before the board (see note 4, *supra*) and institute a proceeding in the Adjustment Board under Section 3 First, where he would be able to appear himself or by private counsel (see p. 2, *supra*). The alternative of such a proceeding before the Adjustment Board, and the narrowness of the judicial review provisions of the Act, distinguish this case from *Hines* v. *Anchor Motor Freight*, 424 U.S. 554.

[7]For example, during the fiscal year ending June 30, 1975, special adjustment boards decided approximately 6,500 cases. National Mediation Board, *Forty-first Annual Report* 44-45 (1975).

[8]An employee may bring an action to review an adverse decision of a special adjustment board in any judicial district "through which the carrier operates." Section 3 First (p).

*The Solicitor General is disqualified in this case.